85-205

Supreme Court, U.S.
FILED
SEP 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. A-932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT ASMUSSEN, ET AL., *Appellants*

v.

CITY OF AUSTIN, TEXAS, *Appellee-Respondent*

v.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *Appellee*

On Appeal From The Court Of Appeals For The Third Supreme Judicial District Of Texas

CITY OF AUSTIN'S MOTION TO DISMISS OR AFFIRM

MARY JOE CARROLL
CLARK, THOMAS, WINTERS & NEWTON
700 Lavaca, Suite 1200
Austin, Texas 78701
(512) 472-8800
Attorneys for Appellee-Respondent City of Austin, Texas

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

BEST AVAILABLE COPY

15 pp

LIST OF PARTIES

CITY OF AUSTIN, TEXAS, Appellee here, Appellant in the interlocutory cause below, and Appellee in the cause on its merits below.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, Appellee here, Appellee in the interlocutory cause below, and Appellee in the cause on its merits below.

Appellees in the interlocutory cause below, not parties here:

Stephen Beers
Delora Frederickson
Rebecca Howard
Allison LaTouf
Michael McConnell
Heidi Gillette Sorenson
Jeffrey James Conn
Ruby Goodwin
Craig Jordan
Jere S. Locke
Kenneth Shepardson
Matthew Sorenson

Appellants here, Appellees in the interlocutory cause below, and Appellants in the cause on its merits below:

Robert Asmussen
Richard Burns
Charolette Carl-Mitchell
Christine Crosby
William Thomas Crouse
Mary Eakin
Fred Ebner
Dan Harrison
Max Nofziger
Ray Reece
Robert L. Russell
William A. Simmons
Daryl Slusher
Phillip S. Blackerby
Smoot Carl-Mitchell
Bert Cromack
James R. Crosby
Sophie Dunn
Pat Eakin
Charlie Haney
Betty Matau
James Pinedo
Joe Riddell
Regina Shults
Lanny Sinkin
Craig von Steiger

TABLE OF CONTENTS

	Page
LIST OF PARTIES	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
GROUNDS FOR DISMISSAL OR AFFIRMANCE	2
(1) The case has become moot.	2
(2) The question presented on appeal was not timely raised.	3
(3) The merits of the cases were decided on the basis of state law without expressly passing on any Federal question.	3
(4) The question urged on appeal has been so plainly foreclosed by decisions of this Court as to make further argument unnecessary.	5
(5) The questions presented are so wanting in substance as to need no further argument.	8
CONCLUSION	8
PRAYER	9

TABLE OF AUTHORITIES

CASES

	Page
Aikens v. State of California, 406 U.S. 813 (1972)	2
Doremus v. Board of Education, 342 U.S. 429 (1952)	2
Edelman v. People of the State of California, 344 U.S. 357 (1953)	3
Local No. 8-6, Oil, Chemical and Atomic Workers International v. Missouri, 361 U.S. 363 (1960)	2
Martinis v. State of California, 444 U.S. 277 (1980)	8
McCoy v. Shaw, 277 U.S. 302 (1928)	4
Murdock v. City of Memphis, 20 Wall. 590 (1875)	4
Ortwein v. Schwab, 410 U.S. 656 (1973)	7, 8
Quicksall v. People of the State of Michigan, 339 U.S. 660 (1950)	3
Radio Station WOW v. Johnson, 326 U.S. 120 (1945)	4
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972)	2
United States v. Kras, 409 U.S. 434 (1973)	6, 7, 8
Wolfe v. State of North Carolina, 364 U.S. 177 (1960)	4
Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977)	4

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. VI, cl. 2	6
TEX. CONST. art. XI, § 5	5
SUP. CT. R. 16.1(b)	4
28 U.S.C. § 1257(2)	1
28 U.S.C. § 1257(3)	1
28 U.S.C. § 2103	1
Art. 709-715, Tex. Rev. Civ. Stat.	2
Art. 717m-1, Tex. Rev. Civ. Stat.	2, 5, 6
Art. 1112, Tex. Rev. Civ. Stat.	6
Rule 298, Tex. Rules Civ. Proc.	3
Rule 434, Tex. Rules Civ. Proc.	8
Rule 452, Tex. Rules Civ. Proc.	8

NO. A-932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT ASMUSSEN, ET AL., *Appellants*

v.

CITY OF AUSTIN, TEXAS, *Appellee-Respondent*

v.

HON. JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *Appellee*

CITY OF AUSTIN'S MOTION TO DISMISS OR AFFIRM

Appellants have filed a hybrid document purporting to present two questions on appeal. Although they have titled it "Jurisdictional Statement," Appellants concede that the second of the stated questions is subject only to review by certiorari and assert reliance on 28 U.S.C. § 2103 as well as on 28 U.S.C. §§ 1257(2) and 1257(3). Regardless of whether the instrument is treated as presenting an appeal or an application for writ of certiorari, the case to which it relates does not merit the exercise of jurisdiction by this Court.

GROUNDS FOR DISMISSAL OR AFFIRMANCE

(1) The case has become moot.

The City of Austin instituted this litigation as a bond validation suit under the provisions of art. 717m-1 of the Revised Civil Statutes of the State of Texas. Appellants were intervenors who unsuccessfully sought to prevent the issuance of the bonds. After termination of the state proceedings, the bonds were sold; Appellants so concede (Statement 18). Appellants could have filed —but did not file—a motion for stay of mandate. The bonds issued by the City of Austin have been examined by the Attorney General, approved by him, registered with the Comptroller of Public Accounts and are now incontestable. Articles 709-715, Tex. Rev. Civ. Stat. Mootness is clearly a ground for dismissal.

In *Doremus v. Board of Education,* 342 U.S. 429, 72 S. Ct. 394, 96 L.Ed. 475 (1952), it was pointed out that (342 U.S. 433):

> "This Court does not sit to decide arguments after events have put them to rest. United States v. Alaska Steamship Co., 253 U.S. 113, 116, 40 S. Ct. 448, 449, 64 L.Ed. 808."

Constitutional questions are not to be dealt with abstractly. *Local No. 8-6, Oil, Chemical and Atomic Workers Int'l v. Missouri,* 361 U.S. 363, 80 S. Ct. 391, 4 L.Ed. 2d 373 (1960). *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 92 S. Ct. 1716, 32 L.Ed.2d 317 (1972). Even intervening legislation can result in mootness requiring dismissal. *Aikens v. State of California,* 406 U.S. 813, 92 S. Ct. 1931, 32 L.Ed.2d 511, (1972).

(2) The question presented on appeal was not timely raised.

The pleading of Appellants as intervenors in the trial court is quite lengthy and attacks the bond validation statute on multiple grounds but even though the statute contains the bonding provision, the pleading contains no allegation to the effect that one of the intervenors is an indigent and unable to post bond.

In response to the City's renewed motion for bond (Tr. 119), one of the thirty-eight intervenors filed an affidavit of inability to post bond (Tr. 135), but no ruling was secured thereon.

In order to invoke the jurisdiction of this Court on appeal, the federal question must have been timely raised in the state court. *Quicksall v. People of the State of Michigan,* 339 U.S. 660, 70 S. Ct. 910, 94 L.Ed. 1188 (1950); *Edelman v. People of the State of California,* 344 U.S. 357, 73 S. Ct. 293, 97 L.Ed. 387 (1953).

(3) The merits of the cases were decided on the basis of state law without expressly passing on any Federal question.

The only decision on the merits was that of the trial court. The bases for decision are clearly and abundantly shown in the findings of fact and conclusions of law (reproduced Statement, 45-49). There is no mention of any Federal question. Under the provisions of Rule 298, Tex. Rules Civ. Proc., any party may request additional findings and conclusions; Appellants did not do so.

It has long been established and consistently held that where a state court judgment rests on independent and

adequate state grounds, this Court will decline to review the judgment. *Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875). *McCoy v. Shaw,* 277 U.S. 302, 48 S. Ct. 519, 72 L.Ed. 801 (1928). *Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 90 L.Ed. 2092 (1945). *Wolfe v. State of North Carolina,* 364 U.S. 177, 80 S. Ct. 1482, 4 L.Ed.2d 1650 (1960).

The principle was recently stated in *Zacchini v. Scripps-Howard Broadcasting Company,* 433 U.S. 562, 97 S. Ct. 2849, 53 L.Ed.2d 965 (1977), where this Court wrote (433 U.S. 566):

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, Wilson v. Loew's Inc., 355 U.S. 597, 78 S. Ct. 526, 2 L.Ed.2d 519 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion.' Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S. Ct. 459, 463, 89 L.Ed. 789 (1945)."

Rule 16.1(b) of the Rules of this Court incorporates the principles to which reference has been made above and is clearly indicative of the right of the City of Austin to dismissal in this case.

(4) The question urged on appeal has been so plainly foreclosed by decisions of this Court as to make further argument unnecessary.

The only appellate opinion involved in this proceeding is that in Cause No. 14,267, an interlocutory appeal brought by the City of Austin asserting trial court error in refusal to set a damage bond under the provisions of § 8 of art. 717m-1 (Tex. Rev. Civ. Stat.). That opinion (reproduced Statement, 31-37) does focus on the question which Appellants assume to bring before this Court on appeal and determines it adversely to Appellants' argument.

At the outset, however, it is important to clarify the issue. Appellants' phraseology of the question is (Statement, 1):

> "Question: Is a state statute under which court access for defense of the right to vote is withheld because of the failure to post a $2 million prospective damage bond invalid on grounds of repugnancy to the Equal Protection guarantees of the Fifth and 14th Amendments to the Constitution of the United States?
>
> "Appellants expressly include in this question the subsidiary questions in which: (A) an indigent seeks court access and (B) the access sought includes a statutory right to appellate review."

The state statute, art. 717m-1, has nothing whatsoever to do with "the right to vote." Appellants' contention of a right to vote is based solely on a provision in the charter of the City of Austin. As a home rule city, Austin is controlled by art. XI, § 5 of the state constitution which specifies, in part, that:

> "[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. . . ."

Under that provision, obviously a state counterpart of the Supremacy Clause in the United States Constitution, the voter auhorization in the city charter was held to be invalid because of its inconsistency with art. 1112 of the Revised Civil Statutes of the State of Texas. That was the conclusion of the trial court in deciding the merits of the case (Supplemental Tr., 47-48).

The damage bond provision which Appellants attacked is included in the bond validation statute, art. 717m-1. The bond requirement was sustained by the Austin Court of Appeals which clearly rejected Appellants' contention that the indigency of one of the parties made the bond requirement invalid even as applied to an indigent. The holding was firmly based on this Court's most pertinent decisions.

In *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L.Ed.2d 626 (1973), this Court held that the forma pauperis statute is not available in bankruptcy and that the statutory requirement of payment of filing fees as a condition precedent to obtaining discharge in bankruptcy has a rational basis and does not deny indigents equal protection of the laws. That was a case in which the individual indigent was seeking something particular for himself. In the situation now before the Court, Appellants, merely because one of their number is an indigent, seek to avoid a statutory bond requirement which has a rational basis.

Another situation in which indigents were seeking relief particularly on their own account was before the Court in *Ortwein v. Schwab,* 410 U.S. 656, 93 S. Ct. 1172, 35 L.Ed.2d 572 (1973), reh. den. 411 U.S. 922. That case originated as a mandamus proceeding to compel the Oregon court of appeals to accept, without the payment of a filing fee, a petition for review of decisions of the state welfare division. Following the *Kras* decision, this Court held that (410 U.S. 660):

> "Appellants urge that the filing fee violates the Equal Protection Clause by unconstitutionally discriminating against the poor. As in Kras, this litigation, which deals with welfare payments, 'is in the area of economics and social welfare.' 409 U.S., at 446, 93 S. Ct., at 638; see Dandrige v. Williams, 397 U.S., at 485-486, 90 S. Ct., at 1161-1162. No suspect classification, such as race, nationality, or alienage, is present. See Graham v. Richardson, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852, 29 L.Ed.2d 53 (1971). The applicable standard is that of rational justification."

The due process clause does not require the state to provide for appellate review. This Court so noted (410 U.S. 660):

> "This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system. McKane v. Durston, 153 U.S. 684, 687, 14 S. Ct. 913, 914, 38 L.Ed. 867 (1894); see Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L.Ed. 891 (1956); District of Columbia v. Clawans, 300 U.S. 617, 627, 57 S. Ct. 660, 663, 81 L.Ed. 843 (1937); Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972)."

What Appellants here are actually seeking is a ruling that 38 citizens, merely because one of them is an indigent, may, without bond, indefinitely delay through appellate processes municipal funding authorized by state law, sustained by judicial decision, and based upon rational justification. The *Kras* and *Ortwein* decisions, in effect, determine the question contrary to Appellants' contention. No further argument should be necessary.

(5) The questions presented are so wanting in substance as to need no further argument.

Appellants' due process contentions are in reality complaints with regard to longstanding Texas Rules of Civil Procedure. Rule 434 authorizes a court of appeals to render the judgment or decree which the court below should have rendered. Ordering an opinion not to be published is authorized by Rule 452. The court's following of those rules was not violative of due process. The issues were not raised in the courts below, but even if they had been, they would not merit this Court's consideration. California statutes providing somewhat comparable procedures were sustained in *Martinis v. State of California,* 444 U.S. 277, 100 S. Ct. 553, 62 L.Ed.2d 481 (1980).

CONCLUSION

Appellants have not fulfilled the requirements for this Court's jurisdiction and have presented no issue meritorious of this Court's ruling.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee-Respondent, The City of Austin, Texas, prays that the cause be dismissed or the determinations of the state courts be affirmed.

Respectfully submitted,

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
(512) 472-8800

BARRY BISHOP
P. O. Box 1148
Austin, Texas 78767
(512) 472-8800

Attorneys for Appellee-Respondent City of Austin, Texas

Of Counsel:

CLARK, THOMAS, WINTERS & NEWTON
P. O. Box 1148
Austin, Texas 78767

PAUL ISHAM
City Attorney

JONATHAN DAVIS
First Assistant City Attorney
P. O. Box 1088
Austin, Texas 78767